United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

Date: December 4, 1997

Case No. 96 INA 174

In the Matter of:

GREEK CORNER RESTAURANT
Employer[1]

on behalf of

NASSER RASHIDI,
Alien

Appearance: K. M. Tracy, Esq., of Rancho Bernardo, California

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of NASSER RASHIDI (Alien) by GREEK CORNER RESTAURANT, (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.[2]

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[1]The correct name of the Employer is Jafin, Inc., dba Greek Corner Restaurant. AF 105. As the file has been processed under the name used in this caption, however, it will not be altered to avoid confusion. Its corporate president and apparent owner is Nassar Rahnamie. AF 105-107. Mr. Rahnamie is an Iranian national who said he has opened four restaurants of the same type as the named Employer. This is confirmed by the name on the menu, "Greek Corner Restaurants." AF 60, 65, 68. On the other hand, the text at AF 68 says nothing of the Iranian or Persian cuisine and is limited to a glowing description of its service of the foods of Greece.

[2]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.[3]

STATEMENT OF THE CASE

On March 4, 1994, the Employer, which operates a restaurant serving "Greek/Middleastern Ethnic Cuisine" in San Diego, California, applied for labor certification for the Alien to fill the position of Cook. AF 105. The Job to be performed was described as follows:

> Cook to prepare full range of Greek/middleastern menu items. Must oversee the kitchen staff of prep cooks and assistant cook. Must make shift schedules and handle inventory control. Must have a foodhandler's card. Able to prepare full range of gyros in pita and plate, domades, kefta kabob, chela kabob barg, sultans kabob, falafil, spanakopita, taramasalta, hommos, tabouleh, etc. Full range and knowledge of standard restaurant equipment. Also able to make traditional Persian foods for weddings and parties.

(Verbatim copy of original is uncorrected.) AF 105. The Employer's educational requirement was high school graduation, and the experience requirement was two years of experience in the Job Offered or as a Greek Cook. As another Special Requirement, the Employer said the worker

> Must be able to speak English and Farsi as we cater to many

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[3]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

> events for the Iranian community. Must also have a Food-handler's card.

(Verbatim copy of original is uncorrected.) Id.[4] The job was classified as Cook, Specialty Foreign Foods, under DOT No. 313.361-030.

Notice of Findings. By the Notice of Findings (NOF) issued on May 18, 1995, the Certifying Officer (CO) said certification would be denied subject to rebuttal. AF 98. (1) The CO cited three grounds for denial, the more significant of which was the business necessity of the Farsi language requirement. The CO said the Employer had not submitted sufficient evidence to prove that its Farsi language requirement was a business necessity and not a preference. The CO then listed specific documentation to be submitted on rebuttal to establish a business necessity for the Employer's Farsi language requirement. AF 99-101. (2) The second ground for denial was the restrictive requirement that alluded to skills required for the preparation of Persian food, for which no supporting proof of business necessity was offered in the application. AF 101-102. (3) The Alien failed to list in Item 15 of ETA 750B all of the jobs he had held during the previous three years, as his experience was documented only to December of 1990. AF 102-103.

Rebuttal. The rebuttal filed May 24, 1995, included the Employer's statement, which addressed all three of the grounds for denial stated in the NOF. (1) The argument offered by the Employer essentially contended that it was inconvenient to communicate in a language other than Farsi in conducting its business. (2) In support of the requirement for experience in Persian cooking, the Employer identified the food items that he regards as Persian, indicating that the menu is about half Greek and half Persian. (3) The Employer filed an amendment to ETA 750, Part B, for the purpose of correcting the application as directed by the NOF. AF 60-97

Final Determination. The CO's Final Determination of July 5, 1995, denied Certification. AF 56-59. The CO noted that the Employer had duly resolved the deficiency in the description of the Alien's experience in the Application, and stated that this issue was closed. The application was denied on the grounds of the restrictive language requirement and the need for a cook skilled in Persian specialties, which was inadequately supported by the rebuttal. (1) The CO found that the Employer failed to justify the business necessity for the required fluency in Farsi, concluding that the Employer's rebuttal supported the finding

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[4]Employer offered $8.00 per hour for this forty hour a week position on a rotary shift, with no overtime contemplated.

that this skill was required for the Employer's convenience and as a cultural preference, rather than as a business necessity. (2) The CO further found that the supporting evidence in the menu gave no indication that Persian dishes were being served, in spite of the Employer's representations. As the implication that Persian style food also is being served is not plainly evident, Employer offered no justification for the use of this criterion to reject otherwise qualified U. S. workers.

Appeal. Employer's request for review of July 23, 1995, restated the documentation previously submitted, but added little beyond a rephrasing of the rebuttal. While Employer requested the CO to "reconsider" the NOF, no mistake or omission of the CO was cited, and no reason was given for such a reexamination of the record by the CO. Accordingly, reconsideration was denied and the file was duly referred to BALCA for review. **Harry Tancredi**, 88 INA 441 (Dec. 1, 1988)(en banc). AF 001.[5]

DISCUSSION

20 CFR § 656.21(b)(2)(i)(C) provides that the proposed job opportunity shall not require a language other than English unless that requirement is adequately documented as arising from Employer's business necessity. To establish the business necessity for its foreign language requirement Employer must demonstrate that the business clients, co-workers, and contractors speak the foreign language, giving also the percentage of employer's business that involves the foreign language. The employer also must prove that the proposed job duties require the Employee to communicate or read in a foreign language. **Coker's Pedigreed Seed Co.**, 88 INA 048 (Apr. 19, 1989) (en banc). To sustain its burden of proof, an employer must submit evidence to support its assertion that fluency in a language other than English is essential. **Spashware Company,** 90 INA 038 (Nov. 26, 1990).

In response to the NOF requirement that Employer document the total number of clients/people it deals with and the percentage of its patrons who cannot communicate in English, Employer estimated the percentage of its customers who prefer to speak Farsi or who speak Farsi only, but this was not supported by any documentation other than a statement by the Employer's president. Employer nevertheless argued that its rebuttal is sufficient to prove the business necessity of the foreign language requirement stated in its application.

BALCA has held, however, that mere assertions do not suffice to establish business necessity, and that evidence is required to

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[5]New counsel's request for remand for the purposes stated is rejected as pointless and lacking in merit.

support such assertions. Employer did not support its representations with documentation of any kind. Moreover, as no reason is given for a cook to be fluent in Farsi, nothing appears in the rebuttal or in the Employer's restatement of the rebuttal in its motion for reconsideration that supports our finding that this worker's use of Farsi was more than a personal and cultural convenience for the Employer. **Ace-Tech Auto,** 93 INA 484 (Jul. 26, 1994).

The CO correctly explained in the Final Determination that the bill of fare offered in this restaurant did not state a single food item that a non-Iranian customer could recognize as Persian, even though persons of Iranian background would have no such difficulty. If this was not clear to the average patron, it is reasoned that it would not be apparent to a qualified U. S. worker who might wish to apply for the position at issue.

Accordingly, we find the CO's denial of certification was supported by the evidence of record, as the Employer failed to establish the business necessity of either the foreign language requirement or the Persian Specialty Foods cooking skills stated in its application for labor certification.

Consequently, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.